

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Greyhound Lines, Inc., Case 2-CA-24300

506-3067-5000, 506-6050-1260, 506-6050-3100, 506-6050-8700

This case was submitted for advice on: (1) whether an employee who was discharged for refusing to drive a bus during a strike by fellow employees engaged in protected concerted activity; and (2) if so, whether the discharge was lawful based on the employer's need to operate its business efficiently.

Facts

Edward Kelly is a Field Manager-Licensing for Greyhound Lines, Inc. (Employer). His duties are to match licenses, decals and stickers with registration cards by bus numbers; to ensure that license materials are installed on a timely basis; to ensure the removal of all expired exterior license materials from the buses; to inspect cab card holders for insurance registration cards and related documents; and install new documents as needed. Kelly does not supervise any employees. He reports directly to the Manager of Fleet Licensing and Auto Procurement in Dallas, Texas.[1]

From 1964 through 1983, Kelly was a member of Local 1202, Amalgamated Transit Union (Union). In 1983, when the Union last went on strike, Kelly resigned from the Union.[2] At that time Kelly received several threatening calls at home that "they" were going to get him and kill him. In January, February and March 1990, during the time that a possible strike by the Employer's bus drivers was being discussed, Kelly received several anonymous calls at home. Each time the caller told Kelly "don't do what you did last time. We are watching you."

On March 2, the Employer's bus drivers went on strike. [3] On March 9, when Kelly got home from work he learned that someone from Dallas had called him. He called Keith Hummer, Director of Fleet Organization, in Dallas, and asked what was going on. Hummer told him to call New York. Kelly then called New York and spoke to Thomas Caldwell, Manager of Fleet Utilization. Caldwell told Kelly that he had to be at the Port Authority Bus Terminal on Sunday, March 11 at 6: 30 a.m. to drive a bus with student drivers to Virginia. Kelly asked if anyone else was around and Caldwell said no.

On March 10, Ron Jasper, Manager of Operations and Charters in New York City, called Kelly at home and told him that he had to be there at 6: 30 the next day to drive a bus of student drivers to Virginia. Kelly told him he would call him back. Kelly tried to call Hummer, but Hummer was not in. Kelly then called Jasper back and told him that he was afraid to go down to Virginia and that his wife was afraid as well. Jasper told Kelly that maybe somebody else could do it. Kelly said he would try to call Hummer again. Hummer called Kelly and asked him whether he was refusing to go to Virginia. Kelly replied that he was not refusing, he was afraid to go down there. Hummer asked him whether anybody had threatened him and Kelly told him about the phone calls he had received. Hummer told Kelly that he would get back to him.

Later that day, Hummer called Kelly back and told him "I went all the way to the top and you have to go." Kelly replied that he was afraid and that they were watching him. Hummer asked Kelly for the name of the person who had threatened him. Kelly answered that the threats were not made in person, that he had received phone calls at home. Hummer told Kelly that he could take his wife with him. Kelly replied that instead of him getting shot his wife could also get shot. He also told Hummer that he had to talk with his wife about this. Kelly talked with his wife and called Hummer back to let him know that he and his wife were afraid of going to Virginia because of the threatening phone calls. Kelly told him that he was concerned about what would happen to his wife and kids if he went. He stated again that he was not refusing to go, he was afraid to go. Hummer then terminated Kelly.

The Employer contends that Kelly's discharge was lawful. It argues that Kelly's refusals to drive the bus to Virginia was not protected concerted activity, because he acted individually in refusing the work. In addition, the Employer argues that Kelly's refusal to drive the bus to Virginia was a partial strike and unprotected. Moreover, the Employer claims that Kelly did not engage in protected concerted activity because it was not necessary for Kelly to cross a picket line when driving the bus to Virginia.[4] Lastly, the Employer argues that even if Kelly's action was protected, its interest in the efficient operation of its business overrides Kelly's interest in honoring a picket line.

Action

We conclude that Kelly, by refusing to drive a bus of student drivers to Virginia, engaged in protected concerted activity. We further conclude that the Employer unlawfully discharged Kelly in violation of Section 8(a)(1) of the Act.

It is well established that even one employee who chooses to honor a picket line of striking coworkers engages in protected concerted activity.[5] Furthermore, the employee's motive in refusing to cross a picket line is irrelevant.[6] Thus, an employee may refuse to cross a picket line simply out of fear for his or her own safety and still be engaged in protected concerted activity.[7]

In addition, an employee who honors a picket line with the result that his or her services are completely withheld from an employer is entitled to the same rights as a striker. [8] As such, the employee may be replaced but not discharged. [9] However, an employee who honors a picket line at another employer's facility, with the result that he or she only partially withholds services from his or her employer may be discharged. In that situation, although the employee is engaging in protected concerted activity,[10] if an employer can show that it is necessary for the preservation of the efficient operation of its business, it may discharge the employee in order to replace the employee with an employee who is willing to perform all job duties.[11]

In *Business Services by Manpower*, supra, the Second Circuit, in refusing to enforce the Board's decision, used a balancing test in sympathy strike situations which weighed employees' Section 7 rights against an employer's business necessity. In that case, the Second Circuit found that the employees' Section 7 rights were rather weak as the employees had refused to cross an informational picket line at a customer's facility. In comparison, the Second Circuit found that the employer had a compelling interest in getting the job done based on the nature of its business, a temporary help service. In *Savage Gateway Supermarket, Inc.*, [12] a case involving an employee who honored a primary picket line, the Board found that the employee's discharge was unlawful even using the Second Circuit's balancing approach in *Business Service By Manpower*, since the employee was respecting a primary picket line and the Employer was unable to show any harm by the employee's refusal.

Based on the above, we conclude that Kelly engaged in protected concerted activity when he refused to drive the bus to Virginia. In the circumstances of this case, by refusing to drive the bus to Virginia, Kelly was refusing to cross a primary picket line set up by fellow employees. Thus, it is clear that even though Kelly refused on his own, he engaged in protected concerted activity.[13] Furthermore, Kelly's motive for refusing is irrelevant. Even though Kelly refused to drive the busload of student drivers to Virginia out of fear for his own safety, he still engaged in protected concerted activity. [14]

Furthermore, when Kelly refused to drive the bus he was not engaging in a partial withholding of his services. Kelly was called to do a particular job, that of driving a bus load of student drivers to Virginia. When he refused to drive the bus, he was actually refusing to do an entire assigned job for that day, not just a portion of his required duties.[15] Where, as in the instant case, an employee withholds all services when refusing to cross a picket line, the employee assumes the same status as the strikers. In these circumstances, even if the Employer could lawfully replace Kelly, it could not discharge him for asserting his Section 7 rights. Thus, by discharging Kelly for refusing to cross a primary picket line by driving a bus full of replacement drivers, the Employer violated Section 8(a)(1).

Even assuming, however, that Kelly's conduct was equivalent to a partial withholding of services, we conclude that the Employer unlawfully discharged him in violation of Section 8(a)(1). In the instant case, there is no evidence that the efficient operations of the Employer necessitated discharging Kelly for refusing to drive the busload of student drivers to Virginia. Unlike the situation in *Business Services*, Kelly gave the Employer advance notice that he was frightened to drive the bus.[16] Thus, the Employer had adequate notice to contact another employee to drive the bus.

Furthermore, the Employer was basically requiring Kelly to do work that he did not normally perform as part of his required duties. In cases involving struck work, the Board has found that an employer does not have a legitimate business justification when it discharges employees who refuse to do struck work which they are not normally required to perform. [17] Similarly, the Employer did not discharge Kelly here for refusing to do his normal assignments. The Employer discharged Kelly solely for his refusal to drive a bus, a job which is normally done by his striking coworkers. In addition, there is no evidence that Kelly's refusal to drive the bus to Virginia eliminated the need for his regular services.[18] In these circumstances, the Employer does not have a legitimate business justification for discharging Kelly. For similar reasons, the Employer's claim that Kelly was engaged in an unprotected partial strike is also without merit, since there is no allegation that Kelly refused to perform any of his regular duties.[19]

Moreover, even using the balancing approach adopted by the Second Circuit in *Business Services By Manpower*, supra, Kelly's Section 7 rights here are clearly more compelling than the Employer's need for efficient operation of its business. Unlike in *Business Services*, Kelly was not honoring an informational picket line at a wholly unrelated employer. Rather, he was honoring a primary picket line set up by fellow employees.[20] As such, Kelly's Section 7 rights are very strong whereas the Employer has been unable to show a business justification for discharging Kelly. [21] In these circumstances, Kelly's Section 7 rights clearly outweigh the Employer's interest in getting the job done. Finally, even assuming that Kelly's refusals to drive the bus disrupted the Employer's efficient operation of its business, the Employer would only have been privileged to discharge him in order to replace him with an employee who would do the work. [22] However, there is no evidence that Kelly was replaced. Accordingly, the Employer was not entitled to discharge Kelly.

Based on the foregoing reasons, we conclude that Kelly engaged in protected concerted activity when he refused to drive the bus. We further conclude that the Employer violated Section 8(a)(1) when it discharged Kelly for refusing to drive a bus to Virginia.

H.J.D.

[1] The Region has determined that Kelly is not a supervisor under the Act and that he does not make or effectuate any managerial policy.

[2] In 1984, Kelly was promoted to his present position, which is not in the bargaining unit.

[3] The Union picketed the Employer nationwide. Locally, the Union picketed the NY-NJ Port Authority Bus Terminal 24 hours a day with no fixed or limited schedule. In the early stages of the strike there were incidents of violence which led to a Section 8(b)(1)(A) complaint against the Union.

[4] The Employer claims that by leaving at 6: 30 a.m. Kelly could have avoided Union pickets and any possible violence.

[5] *Cooper Thermometer Co.*, 154 NLRB 502, 503 (1965). See also *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (2nd Cir. 1942)(Judge Learned Hand's definition of the concerted nature of a sympathy strike).

[6] See *Ashtabula Forge*, 269 NLRB 774, 774-775 (1984); *Dave Castellino & Sons*, 277 NLRB 453, 454 (1985); *Western Stress, Inc.*, 290 NLRB No. 81, slip op. at 4, n. 6 (1988).

[7] *Ashtabula Forge*, supra; *Dave Castellino & Sons*, supra.

[8] See *Business Services by Manpower*, 272 NLRB 827, 828 (1984), enf. denied 784 F.2d 442, 121 LRRM 2827 (2nd Cir. 1986); *Torrington Construction Co.*, 235 NLRB 1540, 1541 (1978); *Newbery Energy Corporation*, 227 NLRB 436, 437 (1976).

[9] See *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 347, 2 LRRM 610 (1938); *Anaconda Insulation Co.*, 298 NLRB No. 168 (1990); *Browning-Ferris Industries*, 259 NLRB 60, 66 (1981), enf. denied 700 F.2d 385, 112 LRRM 2882 (7th Cir. 1982).

[10] An employee who partially withholds service from an employer when he or she refuses to cross a picket line is still engaged in protected concerted activity. Thus, the Board does not view the employees as engaging in an unprotected partial strike. See *Torrington Construction Co.*, 235 NLRB at 1541; *Newbery Energy Corporation*, 227 NLRB at 437; *Virginia Stage Lines, Inc.*, 441 F.2d 499, 76 LRRM 3057 (4th Cir. 1971) enforcing 182 NLRB 717 (1970).

[11] See *Redwing Carriers*, 137 NLRB 1545, 1547-1548 (1962). In *Redwing Carriers, Inc.*, supra, drivers in the course of making deliveries refused to cross a picket line at a customer's business. The employees did not refuse to perform all deliveries for their employer, just those which would require them to cross a picket line. The employer immediately discharged and replaced the delivery men with other employees who were willing to do all the duties required of the job. The Board found that, as there was a partial refusal to work, the employer was justified in discharging and replacing the employees in order to preserve the efficient operation of its business.

[12] 286 NLRB 180 (1987).

[13] It is immaterial that the Employer claimed that Kelly would have been able to avoid Union pickets and any possible violence if he left at 6: 30 a.m. to drive the bus to Virginia. The Employer could not guarantee that there would not be any pickets at the Port Authority Bus Terminal at that time since the pickets were there at all hours. Furthermore, even assuming that the Employer was correct concerning the absence of pickets at that time, driving the bus to Virginia is equivalent to doing work behind a picket line. Thus, refusing to drive the bus to Virginia would still be protected concerted activity. Cf. *Virginia Stage Lines, Inc.*, 182 NLRB 717 (1970), *enfd.* 441 F.2d 499, 76 LRRM 3057 (4th Cir. 1971).

[14] *Limpert Bros.*, 276 NLRB 364, 379-380 (1985); *Ashtabula Forge*, 269 NLRB at 774-775.

[15] See *Newbery Energy Corp.*, 227 NLRB at 437.

[16] *Western Stress*, 290 NLRB No. 81 at 5.

[17] *Supermarkets General Corp.*, 296 NLRB No. 149 (1989); *G & H Products, Inc.*, 261 NLRB 298, 306-307 (1982); *Cooper Thermometer Co.*, 154 NLRB at 506. Cf. *Vic Koenig Chevrolet*, 263 NLRB 646 (1982).

[18] *Albritton Communications, Inc.*, 271 NLRB 201, 205 and 231 (1984); *General Tire & Rubber Co.*, 190 NLRB 227,230 (1971), *enfd.* 451 F.2d 257 (1st Cir. 1971).

[19] *Albritton Communications, Inc.*, 271 NLRB at 231.

[20] The Employer's claim that Kelly would not have had to cross a picket line if he left at 6: 30 a.m. does not weaken Kelly's Section 7 rights, especially since the evidence shows that the pickets at the Port Authority did not have a fixed schedule and were there basically at all hours. In any event, the Employer did not discharge Kelly for refusing to leave at an early time, but for refusing to drive the bus at all. *Western Stress*, 290 NLRB No. 81 at 5-6.

[21] *Savage Gateway Supermarket, Inc.*, 286 NLRB at 184.

[22] *Anaconda Insulation Co.*, 298 NLRB No. 168 slip op. at 20-21 (1990). Cf. *Overnite Transportation Co.*, 209 NLRB 691,692 (1974).